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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979
No. 79-6634

ORIGINAL COPY

MILLICENT LINDEN,

Plaintiff-Appellant,

-against-

ST. MARTIN'S PRESS and SIDI HESSEL,

Defendants-Appellees.

On Appeal from the Court of Appeals
for the Second Circuit and
United States District Court for
the Southern District of New York

MOTION TO DISMISS OR TO AFFIRM

Defendants-Appellees ST. MARTIN'S PRESS, INCORPORATED ("St. Martin's") and SIDI HESSEL ("Hessel") move this Court, pursuant to Rule 16 of the Rules of the Supreme Court, to dismiss the appeal herein on the grounds hereinafter set forth, or to affirm the judgment of the Court of Appeals for the Second Circuit sought to be reviewed on this appeal, on the ground that it is manifest that the questions on which the decision of this cause depend are so insubstantial as not to need further argument. In addition, if this Court should treat the papers of the Plaintiff-Appellant as a petition for a writ of certiorari, pursuant to 28 U.S.C. §2103, that petition should be denied.

This appeal, the third of Plaintiff-Apellant to reach this Court regarding alleged infringement of the works of the Plaintiff-Appellant by books by three separate authors and three

separate publishers*, is ultimately from a judgment entered against her in the District Court after a trial by jury. The appeal from that judgment was, in turn, dismissed by the Court of Appeals for the Second Circuit. This Court should dismiss this appeal since it is clearly beyond the jurisdiction of this Court, the questions presented are insubstantial and are not in need of further argument, there was no error in the court below, no federal questions are presented and there is no other reason for this Court to entertain jurisdiction or to consider the questions raised by Plaintiff-Appellant on this appeal.

The Proceedings Below

This action was commenced by Plaintiff-Appellant against Defendants-Appellees St. Martin's and Hessel in the United States District Court for the Southern District of New York by a Summons and Complaint dated April 12, 1979, alleging that a work, authored by Defendant-Appellee Hessel and published by Defendant-Appellee St. Martin's entitled The Articulate Body, infringed upon the copyright of Plaintiff-Appellant in nine separate works. After completion of pre-trial discovery, a jury trial was held before Judge Milton Pollack on December 26, and 27, 1979. In response to special questions, the jury found that there was no substantial similarity between The Articulate Body and any of the works of Plaintiff-Appellant. The District Court, therefore, directed a verdict for Defendants-Appellees. Judgment was entered dismissing the Complaint on December 31, 1979.

* The two other appeals were Linden v. Dail Press, appeal dismissed and cert. denied, 442 U.S. 908 (1979); and Linden v. Harper & Row Publishers, Inc., appeal dismissed and cert. denied, ___U.S.___, 100 S.Ct. 20 (1979).

Thereafter, Plaintiff-Appellant sought to prosecute an appeal from this judgment in forma pauperis. Judge Pollack, who had presided at the trial, in his certification dated January 8, 1980 made in response to the inquiry of the pro se clerk, recommended that Plaintiff-Appellant not be allowed to appeal in forma pauperis because her claims were "completely baseless" and because she had lost at trial on questions of fact decided by a jury. In addition, Judge Pollack, in denying the motion of Plaintiff-Appellant to delay execution of the judgment for costs, described the action of Plaintiff-Appellant as "patently lacking in merit." (Order of February 19, 1980; emphasis in original).

The Court of Appeals for the Second Circuit denied the motion to appeal in forma pauperis and dismissed the appeal by an Order dated April 14, 1980.

I.

THIS APPEAL SHOULD BE DISMISSED, OR THE JUDGMENT OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE AFFIRMED.

The Plaintiff-Appellant has filed a jurisdictional statement in this Court. However, this appeal is not within the jurisdiction of this Court, as it is not authorized by any statute or rule. Pursuant to Rule 16(a) of the rules of this Court, Defendants-Appellees move to dismiss this appeal. In addition, pursuant to Rule 16(c) of the rules of this Court, the Defendants-Appellees move to affirm the decision below on the ground that the questions raised are so insubstantial as not to warrant further argument. Hodges v. Snyder, 261 U.S. 600 (1923); City of Boston v. Jackson, 260 U.S. 309 (1922). The granting of

such a motion is particularly appropriate in this case, which turns essentially on questions of fact and in which there is no clear error. Bodkin v. Edwards, 255 U.S. 221 (1921).

In this case the Plaintiff-Appellant appeals from a jury verdict finding no substantial similarity between the works of Plaintiff-Appellant and the book written by Defendant-Appellee Hessel and published by Defendant-Appellee St. Martin's. Substantial similarity is the basic test for determining whether copyright infringement has occurred. Reyher v. Children's Television Workshop, 533 F.2d 87, 90 (2d Cir.), cert. denied, 429 U.S. 980 (1976). To establish infringement, the plaintiff is required to prove a degree of similarity between the works in question which is so extensive that the "average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Ideal Toy Corp. v. Fab-Lu Ltd., 360 F.2d 1021, 1022 (2d Cir. 1966). Accord, Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co., 509 F.2d 64, 65 (2d Cir. 1974).

Such a determination is the resolution of a question of fact. Ideal Toy Corp. v. Fab-Lu Ltd., supra, 360 F.2d at 1022. In this case, the jury in response to the question "Is there substantial similarity between the defendant's book and the plaintiff's works," found no such similarity after a two-day trial. Judge Pollack found the action to be "completely baseless" and "patently lacking in merit." The Court of Appeals for the Second Circuit apparently agreed, denying the motion of Plaintiff-Appellant to appeal forma pauperis and dismissing her appeal. There is no jurisdiction of this appeal, making dismissal appropriate. It is also apparent that the questions raised are so

wanting in substance as not to require further argument and that this is a case which turns essentially on questions of fact, both justifying affirmance of the determination of the Court of Appeals for the Second Circuit.

II.

THERE IS NO REASON TO GRANT A WRIT OF CERTIORARI IN THIS ACTION.

Pursuant to 28 U.S.C. §2103, this Court may treat an appeal improvidently taken as a petition for a writ of certiorari. However, in this action there exist no grounds supporting such a petition.

The rules of the Supreme Court provide that the granting of a writ of certiorari is within the discretion of the Court and merited only where "special and important reasons therefor" exist. Supreme Court Rule 19. In this case, no such special reasons exist: there is no conflict between or among the Courts of Appeals with regard to any question raised by this appeal; there is no important, but unsettled, question of federal law raised; no departure from the accepted or usual course of judicial proceedings has occurred; there is no question of state law involved; and there is no conflict between the decision herein and any other decision of this Court.

The determination of the jury in this case was correct. No error was committed by the District Court in its judgment for the defendants nor by the Court of Appeals in dismissing the appeal from that judgment. There is no ground for granting a writ of certiorari in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed or, in the alternative, the judgment below should be affirmed. If the appeal should be treated as a petition for a writ of certiorari, such petition should be denied.

Dated: June 19, 1980

Respectfuly submitted,

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By _____
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